

Congress of the United States
House of Representatives
Washington, DC 20515

December 28, 2018

The Honorable Mitch McConnell
Majority Leader
United States Senate

The Honorable Matthew Whitaker
Acting Attorney General
U.S. Department of Justice

The Honorable Michael E. Horowitz
Inspector General
U.S. Department of Justice

Dear Majority Leader McConnell, Attorney General Whitaker and Inspector General Horowitz:

During 2016, the Department of Justice (DOJ) and the Federal Bureau of Investigation (FBI) had the candidate of one major political party under investigation for potential criminal misconduct and, within a month of concluding that investigation, launched a counter-intelligence investigation into the campaign of another major political party candidate.

Serious questions and concerns have been raised about the thoroughness and impartiality of these investigations, as well as investigative techniques used and not used. For instance, some have wondered why the existence of the investigation into Secretary Clinton's alleged mishandling of classified information was made public, but the counter-intelligence investigation into alleged coordination between some members of the Trump campaign and Russia was not made public. Moreover, with respect to the Clinton investigation, non-charging decisions were made and announced by the FBI, not the prosecutors at Main Justice, in an unprecedented way, while some of the agents and attorneys assigned to work on the investigation into potential coordination between the Trump campaign and Russia had bias, if not animus, toward the very candidate whose campaign they were assigned to dispassionately investigate.

The ramifications of decisions made and not made, the bias of some agents and attorneys involved, and the seemingly disparate treatment these investigations received have continued to reverberate into 2017, 2018, and potentially beyond.

The questions and concerns noted above prompted the DOJ Inspector General (DOJ-IG) to undertake a comprehensive review of official investigative actions. These questions and concerns also prompted the House Committees on Judiciary and Oversight and Government Reform to jointly investigate decisions made and not made by the FBI and the DOJ in 2016 and

beyond in fulfillment of Congress's constitutionally-mandated responsibility to provide oversight.

In March of 2018, our Committees called for then-Attorney General Jeff Sessions to appoint Special Counsel,¹ specifically to:

review decisions made and not made by the Department of Justice and the FBI in 2016 and 2017, including but not limited to evidence of bias by any employee or agent of the DOJ, FBI, or other agencies involved in the investigation; the decisions to charge or not charge and whether those decisions were made consistent with the applicable facts, the applicable law, and traditional investigative and prosecutorial policies and procedures; and whether the FISA process employed in the fall of 2016 was appropriate and devoid of extraneous influence.²

Then-Attorney General Jeff Sessions did not appoint Special Counsel but, recognizing the significance of the issues raised and the need for confidence in the institutions involved, did appoint United States Attorney John Huber to act as an independent United States Attorney to review the agencies' actions. It is our understanding U.S. Attorney Huber has been engaged in this review since his appointment.

During our joint investigation, House investigators reviewed thousands of documents and conducted transcribed interviews of investigative and prosecutorial decision-makers at the FBI, DOJ, and elsewhere. Those interviews revealed troubling facts which exacerbated our initial questions and concerns. Some of these concerns are set forth below:

With regard to the Clinton investigation it is clear the Bureau and the Department read elements into the "gross negligence" statute, which plainly do not exist in the text of the statute. To be more precise, investigators read into the statute a higher level of scienter, coupled with knowledge and intent; although the investigators could never clearly describe what that particular intent was supposed to be. Equally troubling, there is little to no evidence investigators made any effort to identify evidence that could have addressed the very elements they believed were missing. There is no indication those questions were even asked of witnesses that would have potentially had access to the Secretary's state of mind and no evidence she herself was asked to address questions centered on consciousness of guilt and criminal intent.

To be clear, neither of us is in a position to know whether an investigation centered on the actual elements of the offense, addressing appropriate questions to witnesses with knowledge, or waiting until the end of the interview process – as opposed to May of 2016 – to draw conclusions would have resulted in a chargeable or prosecutable case. What we can say

¹ Letter from Bob Goodlatte, Chairman, House Judiciary Comm., and Trey Gowdy, Chairman, House Oversight & Gov't Reform Comm., to Jeff Sessions, Attorney General, and Rod Rosenstein, Deputy Attorney General (Mar. 6, 2018), https://judiciary.house.gov/wp-content/uploads/2018/03/030618_Special-Counsel-Letter.pdf?utm_source=House+Judiciary+Committee+Press+Releases&utm_campaign=911e937989-EMAIL_CAMPAIGN_2018_03_06&utm_medium=email&utm_term=0_df41eba8fd-911e937989-101865997.

² *Id.*

with confidence is the manner in which this investigation was conducted ensures we may never know the answers to those seminal questions.

At the end of the Clinton investigation, then-Director James Comey chose to depart from longstanding FBI policy and appropriated from the Department of Justice the final decision on whether to charge and prosecute. Comey, as the FBI Director, was the chief investigator, not the prosecutor, and should have presented the relevant evidence to the Department of Justice. The reasons he cites, which in his judgment necessitated the extraordinary departure from Department of Justice policy – chiefly his concern about the objectivity of the Department of Justice – is not remedied by the route he took. While he contends he contemplated calling for the appointment of Special Counsel to ameliorate his concerns, the Inspector General and our Committees found no evidence to support any level of seriousness in calling for an independent review by Special Counsel.

Director Comey stated “no reasonable prosecutor” would have brought the case against Secretary Clinton and that his decision not to was “unanimous” among those involved. FBI General Counsel James Baker, however, initially did believe the case could be made from an evidentiary standpoint and multiple witnesses testified to the Committees the FBI’s decision not to recommend charges was not “unanimous.”

General Counsel Baker also testified, following the termination of Director Comey, there were discussions amongst senior FBI and DOJ officials about President Trump’s fitness for office, invoking the 25th Amendment, and the prospect of wearing a recording or transmitting device during conversations with the President. Baker relayed comments attributed to Deputy Attorney General Rod Rosenstein as relayed to him by then-Acting Director Andrew McCabe and FBI attorney Lisa Page. The Committees arranged to interview DAG Rosenstein on this and other important issues in a SCIF with a transcript made available. Regrettably that interview did not take place. There are questions DAG Rosenstein alone can answer and while the allegations are serious, his denial was forceful. The questions deserve to be asked and the DAG deserves the chance to respond.

The Committees also have concerns about not only Director Comey’s decision to appropriate charging and prosecutorial decision-making away from the Department of Justice, but also the drafting of what was tantamount to an exoneration memo months before all witnesses were interviewed. Moreover, the Committees were concerned with what was in earlier drafts of those memos but later edited out. For instance, documents provided to the Committees suggest foreign actors obtained access to some of Clinton’s emails – including at least one email classified “Secret.” There is also concern foreign actors infiltrated the private email accounts of some Clinton staffers. This is significant not only because it was included, then excluded from the exoneration memo, but also because, if true, access by foreign entities goes directly to elements of the offense Comey concluded were missing from the case.

The bias of both named and unnamed FBI employees has been widely reported. Special Counsel Robert Mueller removed Deputy Assistant Director Peter Strzok from his investigation immediately upon learning of texts and emails exhibiting manifest bias against Donald Trump. Likewise, Director Comey testified he very likely would have removed Strzok from the Clinton

investigation had he known about the bias or perception of bias. But Strzok was removed from the investigation well into 2017. This was after he participated heavily in the Clinton investigation, after he interviewed Clinton, after he initiated the Russia investigation, after he promised to stop Trump from becoming President, after he openly discussed an “insurance policy” if Trump won, after he called Trump destabilizing, after he worked on the FISA application, and after he interviewed Michael Flynn. The bias existed at each stage, it just was not discovered. It is not the discovery of bias that is so destructive to fairness, it is the existence of it. How an agent with this level of bias could have been centrally involved at each stage of three major investigations needs to be fully understood so it can be fully avoided and mitigated.

Among other issues of concern is the decision to replace “the President” with “senior government official” in Comey’s exoneration statement, and then to remove altogether information showing President Barack Obama and Hillary Clinton exchanged email communications on her private email server. So too was the decision to alert defense counsel to questions that would be asked of witnesses in the Clinton investigation and the unprecedented decision to allow fact witnesses, who happen to be attorneys, to be present during Clinton’s interview. Questions and the scope of questions were provided to witnesses in the Clinton investigation ahead of time and not only was she afforded her right to have counsel present, she had counsel who were also fact witnesses present. In stark contrast, the FBI discouraged Michael Flynn from having an attorney present and broke from protocol in not notifying the DOJ or White House Counsel.

The FBI Midyear investigative team was delayed in evaluating Anthony Weiner’s laptop, which delayed Comey’s notice to Congress by weeks placing that notice even closer to the date of the election. Coupling the decision to make her investigation publicly known with the decision to speak freely and in detail on July 5, 2016, about someone who was not going to be charged, coupled with the delays in processing the Weiner computer, coupled with the decision to publicly notify Congress her investigation had been re-opened, led to a belief among some Americans that the investigation and its aftermath cost her the November 2016 general election.

Defensive briefings provided by the FBI to the 2016 candidates indicate differences between how the FBI treated former Secretary Clinton and how they treated then-candidate Trump.

Leaks jeopardize the fairness of investigations and the confidence Americans can have in the objectivity of those conducting the investigations. It should be better understood what contact the FBI or DOJ had with the media and whether these contacts were authorized by the leaders of the Bureau and the Department.

The Committees remain concerned with how derogatory information about candidate Trump was accessed by the FBI, the sourcing of such information, the vetting of such information and government reliance on it in court pleadings. This is in addition to overarching concerns about the FISA process and what obligations exist to place a court on notice of informant or source issues and the divulging of bias information.

These are but some of the issues and concerns raised by our investigation. Each of these concerns is but an illustration of our larger objective, which is a fair, even-handed, objective review of the decisions made and not made in 2016 and 2017 so public confidence can be restored or enhanced in institutions we rely so heavily upon. Contrary to Democrat and media claims, there has been no effort to discredit the work of the Special Counsel. Quite the opposite, whatever product is produced by the Special Counsel must be trusted by Americans and that requires asking tough but fair questions about investigative techniques both employed and not employed.

Since our joint investigation began, the DOJ-IG released a report on the first installment of its investigation, *A Review of Various Actions by the Federal Bureau of Investigation and Department of Justice in Advance of the 2016 Election*.³ The DOJ-IG launched additional investigations as a result of the questionable conduct and decision-making discovered during its initial investigation.⁴ The DOJ-IG continues to review potential misconduct committed in 2016 and 2017, including allegations the FISA process was abused.

Regrettably, our joint investigation was impacted by institutional protectionism on the part of DOJ and FBI. For example, the agencies delayed the production of relevant documents and failed to provide witnesses in a timely manner. DOJ continues to refuse to declassify documents necessary to the investigation despite the President's request the documents be declassified. Additionally, the Office of the Special Counsel (OSC) has cited an "ongoing investigation" to deny or delay Congressional access to relevant information and in one instance retrieved documents provided to Congress, arguing the documents were improvidently produced in the first instance.

Our Committees have assiduously avoided interfering with any ongoing criminal, counter-intelligence, administrative, or judicial reviews of conduct engaged in 2016 or 2017. Nevertheless, confidence in venerable institutions like the Department of Justice and the Federal Bureau of Investigation must be restored so the public can trust these institutions to make decisions solely on the facts and the law and totally devoid of political bias or consideration.

Our belief remains a Special Counsel should be appointed to investigate not only the decisions made and not made during the pendency of these investigations, but also the disparate way these two investigations were seemingly conducted. While Congress does not have the power to appoint a Special Counsel, Congress does have the power to continue to investigate and it is our belief the facts uncovered thus far warrant continued oversight by the Legislative Branch and the Inspector General. We invite your attention to the transcripts of witness testimony and we encourage you to continue to investigate these matters, consistent with your jurisdiction, so the final definitive accounting can be made to the American people.

³ DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., *A REVIEW OF VARIOUS ACTIONS BY THE FEDERAL BUREAU OF INVESTIGATION AND DEPARTMENT OF JUSTICE IN ADVANCE OF THE 2016 ELECTION* (June 2018), <https://www.justice.gov/file/1071991/download>.

⁴ Dep't of Justice Office of the Inspector Gen., Press Release, DOJ OIG Announces Initiation of Review (Mar. 28, 2018), <https://oig.justice.gov/press/2018/2018-03-28b.pdf>.

Thank you for your attention to these matters.

Sincerely,



Bob Goodlatte
Chairman
Committee on the
Judiciary



Trey Gowdy
Chairman
Committee on
Oversight and Government Reform

cc: The Honorable Donald J. Trump
President of the United States

The Honorable Christopher Wray
Director, Federal Bureau of Investigation

The Honorable John W. Huber
U.S. Attorney

The Honorable Charles E. Grassley
Chairman, Committee on the Judiciary
United States Senate

The Honorable Lindsey Graham
Committee on the Judiciary
United States Senate

The Honorable Ron Johnson
Chairman, Committee on Homeland Security and Governmental Affairs
United States Senate

The Honorable Richard Burr
Chairman, Senate Select Committee on Intelligence
United States Senate

The Honorable Jerrold Nadler
Ranking Member, Committee on the Judiciary
U.S. House of Representatives

The Honorable Elijah Cummings
Ranking Member, Committee on Oversight and Government Reform
U.S. House of Representatives

The Honorable Devin Nunes
Chairman, House Permanent Select Committee on Intelligence
U.S. House of Representatives

The Honorable Doug Collins
U.S. House of Representatives

The Honorable Jim Jordan
U.S. House of Representatives